

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the SIRS Appeal
of Apple Tree Dental –
Minneapolis and Hawley

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER ON APPLICATION FOR
ATTORNEYS' FEES AND COSTS UNDER THE
MINNESOTA EQUAL ACCESS TO JUSTICE ACT**

The above-entitled matter is pending before Administrative Law Judge Barbara L. Neilson on Apple Tree Dental's application for attorneys' fees and costs under the Minnesota Equal Access to Justice Act (MEAJA)¹ and the objection to the application filed by the Department of Human Services (Department or DHS). Oral argument on the matter was held on August 23, 2013, at the St. Paul offices of the Office of Administrative Hearings. The OAH record on the application remained open following oral argument for submission of replies and supplemental clarification of legal citations. The parties filed supplemental replies on September 9, 2013, at which time the OAH record closed.

Samuel D. Orbovich, Fredrickson & Byron, P.A., appeared on behalf of Apple Tree Dental – Minneapolis and Apple Tree Dental – Hawley. Corrie A. Oberg, Assistant Attorney General, appeared on behalf of the Department.

STATEMENT OF ISSUES

1. Are the Minneapolis and Hawley Clinics of Apple Tree Dental, Inc., "parties" within the meaning of the MEAJA?
2. Is an award of attorneys' fees appropriate under the MEAJA?

SUMMARY OF CONCLUSIONS

The Administrative Law Judge concludes that Apple Tree has failed to show that its Minneapolis and Hawley Clinics fall within the MEAJA's definition of "party." As a result, they are not eligible for an award of attorneys' fees and expenses under Minn. Stat. § 15.472.

¹ Minn. Stat. § 15.471, *et seq.* (2012).

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Apple Tree Dental, Inc. (Apple Tree) is a nonprofit corporation that delivers on-site dental care to residents of nursing homes, long-term care facilities, and other institutions. Apple Tree has clinics located in Minneapolis (Coon Rapids), Hawley, Madelia and Fergus Falls. Apple Tree participates in the Minnesota Medical Assistance Program, which is administered by DHS.²

2. Dentists, like those employed by Apple Tree, use Current Dental Terminology (CDT) codes for dental procedures when billing Medical Assistance. The CDT is a proprietary billing code published by the American Dental Association (ADA).³

3. Under CDT Code D9410, dentists may bill for a “house/extended care facility call.” According to the CDT book, this includes visits to nursing homes, long-term care facilities, hospice sites, and a variety of other institutions. Code D9410 enables dentists to bill for traveling to and from the dental clinic to the patient’s location, in addition to billing for the services actually provided.⁴

4. When billing for dentures, a one-time payment is made once the denture is placed. For six-months following the placement of the dentures, all services relating to fabrication, placement and adjustment of dentures are included in that one-time payment as part of a “global package.”⁵

5. The Department’s Surveillance and Integrity Review Section (SIRS) conducted a post-payment review of paid claims data for Apple Tree for services provided between January 1, 2007, and December 15, 2008. The SIRS review determined that Apple Tree had billed CDT code D9410 multiple times during the relevant time period in connection with the fabrication of dentures.⁶

6. On January 28, 2009, SIRS issued two Notices of Agency Action to Apple Tree. One Notice informed Apple Tree’s Minneapolis Clinic of the Department’s intent to recover \$9,374.80 in alleged overpayments of Minnesota Health Care Program (MHCP) funds based on its billing practices. The other Notice informed Apple Tree’s Hawley

² Affidavit (Aff.) of Corrie Oberg at ¶¶ 2-3 and appended Exhibits (Exs.) 1 and 2 (Jan. 15, 2013) (attached to Department’s Memorandum in Opposition to Apple Tree’s Petition for Attorney’s Fees); Letter from Michael Helgeson to Mr. Pokorny dated Oct. 13, 2011 (attached as AT0094 to First Affidavit (Aff.) of Samuel Orbovich filed in conjunction with Apple Tree’s Motion for Summary Disposition).

³ First Aff. of M. Helgeson at ¶ 3 (Dec. 14, 2011) (attached to Apple Tree’s Motion for Summary Disposition).

⁴ First Aff. of M. Helgeson at ¶ 4; see also Department’s Notices of Agency Action (Jan. 28, 2009) (attached to Notice and Order for Telephone Prehearing Conference and Hearing).

⁵ Aff. of Penny Cell at ¶ 6 (Jan. 15, 2013) (attached to Department’s Memorandum in Opposition to Apple Tree’s Petition for Attorneys’ Fees).

⁶ Notice and Order for Telephone Prehearing Conference and Hearing at 2 (March 25, 2011); Aff. of P. Cell at ¶¶ 5-6.

Clinic of the Department's intent to recover \$1,439.78 in alleged overpayments of MHCP funds based on its billing practices.⁷

7. The Department sought recovery of MHCP funds paid to Apple Tree's Minneapolis and Hawley Clinics for "house calls" they billed under code D9410 on dates when no other billable service was performed. The Department maintained that, where a house call was billed under code D9410 but no other billable service was provided on the same date, the house call was inappropriately billed and was not eligible for payment. The Department contended that code D9410 could only be reported in conjunction with procedure codes for actual services performed on that same day. In addition, because denture-related services provided during the six months after placement are included in the global package payment and are not billable during that time period, the Department concluded that related house calls were likewise not reimbursable.⁸

8. By letter dated February 25, 2011, Apple Tree appealed the Department's Notices of Agency Action.⁹

9. On March 25, 2011, the Department initiated this contested case proceeding.¹⁰

10. On August 10, 2011, the Department filed an Amended Notice and Order for Prehearing Telephone Conference and Hearing. The Amended Notice indicated that, based on additional documentation provided by Apple Tree after the SIRS audit, the total overpayment amount sought by the Department for both clinics had been reduced to \$9,724.08.¹¹

11. On December 15, 2011, Apple Tree filed a Motion for Summary Disposition. In support of its motion, Apple Tree submitted an affidavit of Dr. David Preble, Director of the Council on Dental Benefit Programs (CDBP). The CDBP issues the billing codes used for reporting dental services for payment from a variety of sources, including the Department. Regarding procedure code D9410, Dr. Preble asserted that DHS was misapplying the code and that no other payor or jurisdiction excludes payment for house call visits when they are part of a multi-visit dental procedure. Dr. Preble maintained that many complex dental services require several visits to complete, including bridge work, root canals, and dentures.¹²

12. The Department did not respond to Apple Tree's motion for summary disposition. Instead, it voluntarily withdrew the two Notices of Agency Action that were at issue in this proceeding and requested that the contested case be dismissed.¹³

⁷ Notices of Agency of Action (Jan. 28, 2009).

⁸ *Id.*

⁹ Notice and Order for Prehearing Telephone Conference and Hearing at 2.

¹⁰ Notice and Order for Prehearing Telephone Conference and Hearing.

¹¹ Amended Notice and Order for Prehearing Telephone Conference and Hearing at 2.

¹² First Aff. of Dr. David Preble at ¶¶ 11-13 (Nov. 17, 2011) (attached to Summary Disposition Motion).

¹³ Letter from Assistant Attorney General Scott Ikeda to Administrative Law Judge (August 23, 2012).

13. Following the Department's withdrawal of the Notices of Agency Action, Apple Tree filed the current application for attorneys' fees under the MEAJA.

Based on the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge has jurisdiction in this proceeding pursuant to Minn. Stat. § 15.472.

2. Apple Tree's petition for attorneys' fees and expenses is governed by the MEAJA and the rules of the Office of Administrative Hearings.¹⁴

3. The petition in this matter was properly filed and all procedural requirements of law or rule have been fulfilled. This matter is therefore properly before the Administrative Law Judge.

4. Apple Tree bears the burden to show that it qualifies for fees under the MEAJA.¹⁵

5. The MEAJA defines a "party," in relevant part, as a person named or admitted as a party who is:

(1) an unincorporated business, partnership, corporation, association, or organization, having not more than 500 employees at the time the contested case proceeding was initiated; and

(2) an unincorporated business, partnership, corporation, association, or organization whose annual revenues did not exceed \$7,000,000 at the time the contested case proceeding was initiated.¹⁶

6. Apple Tree has failed to show that its Minneapolis and Hawley clinics fall within the MEAJA's definition of "party."

7. Apple Tree has failed to show by a preponderance of the evidence that it is eligible for an award of attorneys' fees and expenses under the MEAJA.

8. These Conclusions are reached for the reasons discussed in the attached Memorandum, which is incorporated by reference.

¹⁴ Minn. Stat. § 15.471, *et seq.*; Minn. R. 1400.8401.

¹⁵ Minn. Stat. § 15.472; Minn. R. 1400.7300, subp. 5. *See also Donovan Contracting of St. Cloud v. Minnesota Department of Transportation*, 469 N.W.2d 718, 720 (Minn. Ct. App. 1991), *reviewed denied* (Minn. August 2, 1991).

¹⁶ Minn. Stat. § 15.471, subd. 6(a).

Based on the Conclusions of Law, and for the reasons set forth in the Memorandum below, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that:

Apple Tree's Application for Attorneys' Fees and Expenses under the MEAJA is **DENIED**.

Dated: February 20, 2014

s/Barbara L. Neilson
BARBARA L. NEILSON
Administrative Law Judge

NOTICE

This Order is the final decision in this case. Any person aggrieved by this decision may seek judicial review in accordance with Minn. Stat. § 15.474.

MEMORANDUM

I. Applicable Law

Under the MEAJA, if a prevailing party in a contested case proceeding shows that the position of the state was not substantially justified, the Administrative Law Judge "shall award fees and other expenses to the party unless special circumstances make an award unjust."¹⁷

Because the Act is a limited waiver of sovereign immunity, its language must be strictly construed.¹⁸ "Party" is defined in a restrictive fashion in the Act to include only small businesses (those with not more than 500 employees and annual revenues not over seven million dollars) and partners, officers, shareholders, members, or owners of such entities.¹⁹ Recovery is available only in cases where the state's position is represented by counsel and is not substantially justified.²⁰ The word "state" is defined to mean "the state of Minnesota or an agency or official of the state acting in an official capacity."²¹ The phrase "substantially justified" is defined to mean that: "the state's position had a reasonable basis in law and fact, based on the totality of the circumstances before and during the litigation or contested case proceeding."²²

¹⁷ Minn. Stat. § 15.472(a) (emphasis added).

¹⁸ *Donovan Contracting*, 469 N.W.2d at 718.

¹⁹ Minn. Stat. § 15.471, subd. 6.

²⁰ Minn. Stat. § 15.472: *see also Donovan Contracting*, 469 N.W.2d at 718.

²¹ Minn. Stat. § 15.471, subd. 7.

²² *Id.*, subd. 8.

II. Positions of the Parties

Apple Tree argues that it is entitled to an award of attorney's fees and costs under the MEAJA because it was the prevailing party in this matter and the actions pursued by the Department were not substantially justified.

As an initial matter, Apple Tree asserts that its Minneapolis and Hawley Clinics meet the definition of "party" under the MEAJA. Apple Tree notes that the Department focused its claims on only those two specific dental clinics and listed their separate National Provider Identifier numbers in the Notices of Agency Action. In addition, Apple Tree emphasizes that the Notice of Hearing issued by the Department in this contested case proceeding identified only "Apple Tree Dental – Minneapolis" and "Apple Tree Dental – Hawley" as the entities from which repayment was sought; it did not name "Apple Tree Dental, Inc."

Apple Tree also maintains that a plain reading of the MEAJA requires a separate revenue analysis for each named party. Because the Minneapolis Clinic and the Hawley Clinic are named parties in this proceeding and are authorized by the Department to receive reimbursement directly, Apple Tree contends that each clinic should be treated as a separate and distinct entity from the corporation as a whole and the revenues of each clinic should be analyzed separately to determine whether they are below the MEAJA's \$7,000,000 ceiling. Apple Tree insists that there is nothing in the statute that would require that the revenues from all of the corporation's clinics be aggregated before determining whether the MEAJA's revenue limits are satisfied.²³

According to Apple Tree, under a separate revenue analysis, both the Minneapolis and Hawley Clinics had annual revenues of less than \$7,000,000 in 2009 and 2011.²⁴ In support of this claim, Apple Tree offers the affidavit of Nancy Schumacher, Chief Financial Officer of Apple Tree Dental, Inc. According to Ms. Schumacher, the annual revenue for Apple Tree's Minneapolis Clinic, "minus uncompensated care, bad debts, and contract adjustments," was \$4,237,233.98 in 2011 and \$5,043,980.75 in 2009.²⁵ The annual revenue for Apple Tree's Hawley Clinic, "minus uncompensated care, bad debts, and contract adjustments," was \$2,298,318.92 in 2011 and \$1,697,883.80 in 2009.²⁶ Based on this revenue analysis, Apple Tree asserts that each clinic is a small business within the meaning of the MEAJA and meets the definition of a "party."²⁷

²³ Apple Tree's Reply Brief at 1-4.

²⁴ Pursuant to Minn. Stat. 15.471, subd. 6(a)(1), the MEAJA requires that the analysis of corporate revenues and employees is to be done at the time the civil action is filed or the contested case proceeding was initiated. In this case, the two Notices of Agency Action were issued in 2009 and the Notice of Hearing was issued in 2011.

²⁵ First Affidavit of Nancy Schumacher at ¶¶ 11-12 (Dec. 27, 2012) (attached to Application and Petition for Attorneys' Fees).

²⁶ *Id.* at ¶¶ 13-14.

²⁷ Apple Tree also maintains that the exemption from the definition of party for providers of "services pursuant to licensure or reimbursement on a cost basis" set forth in Minn. Stat. § 15.471, subd. 6(c), does not apply to the provision of professional services, such as dentistry, as these services are not subject to

The Department opposes the Petition for Attorneys' Fees. Among other things, the Department argues that Apple Tree is not a "party" under the MEAJA. The Department points out that the plain language of the statute refers to "an unincorporated business, partnership, corporation, association, or organization." According to the Department, there is only one corporation involved in this proceeding and it does not meet the definition of a "small business."²⁸ Where a corporation has several locations or separate provider numbers for different locations, the Department asserts that there is no suggestion in the language of the Act that each separate location may be considered a "party" for purposes of the MEAJA. Because Apple Tree did not show that the revenues from all its clinics were less than \$7,000,000, the Department maintains that it has failed to demonstrate that it is a "party" for purposes of the MEAJA.

III. Analysis

The governing language on this issue in the MEAJA states, in pertinent part:

"[P]arty" means a person named or admitted as a party, or seeking and entitled to be admitted as a party, in a court action or contested case proceeding, or a person admitted by an administrative law judge for limited purposes, **and** who is:

- (1) an unincorporated business, partnership, **corporation**, association, or organization, **having not more than 500 employees** at the time the civil action was filed or the contested case proceeding was initiated; **and**
- (2) an unincorporated business, partnership, **corporation**, association, or organization **whose annual revenues did not exceed \$7,000,000** at the time the civil action was filed or the contested case proceeding was initiated.²⁹

Under the canons of construction, words and phrases in statutes are generally construed in accordance with their common and approved usage.³⁰ Moreover, "[w]hen the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit."³¹

Based on the plain language of the MEAJA and the use of the conjunctive word "and" in the definition of "party," it is clear that, in order to be deemed an eligible "party"

DHS rate setting. Apple Tree does not provide services on a cost basis, and it states that this exclusion is meant to eliminate those prevailing parties who are able to claim reimbursement for their attorney's fees and costs by way of the Medicaid cost reports and underlying rate-setting. The Department did not dispute Apple Tree's interpretation of Minn. Stat. § 15.471, subd. 6(c).

²⁸ DHS Brief, at 3-5.

²⁹ Minn. Stat. § 15.471, subd. 6(a) (emphasis added).

³⁰ Minn. Stat. § 645.08 (1). The only exception involves "technical words and phrases and such others as have acquired a special meaning, or are defined in [Minn. Stat. Ch. 645]," which are construed according to their special meaning or definition.

³¹ Minn. Stat. § 645.16.

for purposes of the Act, the entity must: (1) be named or admitted as a party in a lawsuit or contested case proceeding; (2) be an unincorporated business, partnership, corporation, association, or organization; and (3) fall within the designated limitations for employees and revenue. In accordance with strict construction principles, any entity that falls outside of this narrow statutory definition is not eligible for an award of attorneys' fees under the MEAJA.³²

The Minneapolis and Hawley Clinics satisfy the first prong of the statutory definition since they were named as parties in the contested case proceeding. However, they fail to satisfy the second prong because they have not been shown to be separate legal entities from Apple Tree Dental, Inc. There is no evidence in the record demonstrating that each clinic is an unincorporated business, partnership, corporation, association or organization within the meaning of the MEAJA.³³

The fact that the Department named two specific Apple Tree clinics in this matter does not render those clinics distinct parties separate from the corporate form of Apple Tree, Inc. Likewise, the fact that the various Apple Tree clinics have separate provider numbers for purposes of billing Medical Assistance does not make them separate entities under the law. To accept Apple Tree's argument and characterize the corporation's individual clinics as separate small businesses would improperly expand the class of persons eligible for benefits under the MEAJA and would be inconsistent with the limited waiver of sovereign immunity and strict construction intended by the Act.

In *McMains v. Commissioner of Public Safety*,³⁴ the Minnesota Court of Appeals examined the MEAJA's legislative history and noted the legislature's emphasis on small businesses in committee reports, journal entries, and tape recordings of legislative testimony and discussion. The Court found that "[t]he presentation of the bill, testimony, and discussion of various amendments that were prepared make it clear that the parties entitled to recover fees and expenses under the bill are small businesses that meet the requirements [under the statute]."³⁵

Because Apple Tree's Minneapolis and Hawley Clinics are part of the larger corporate entity known as Apple Tree Dental, Inc., they are not small businesses and do not meet the definition of "party" under the MEAJA. In addition, the Administrative Law Judge notes the general involvement of Apple Tree Dental, Inc., throughout this proceeding. Apple Tree's Motion for Summary Disposition was supported by affidavits from the Chief Executive Officer of Apple Tree Dental, Inc. (Dr. Michael Helgeson) and its Chief Financial Officer (Nancy Schumacher). The invoices sent by Fredrikson & Byron for services rendered in this case were directed to Dr. Helgeson's attention at the corporate offices of "Apple Tree Dental"³⁶ and, according to Ms. Schumacher's affidavit, Apple Tree Dental, Inc., had incurred \$37,509.50 in attorneys' fees in this matter as of

³² See *Donovan Contracting*, 469 N.W.2d at 718.

³³ See Minn. Stat. § 15.471, subd. 6.

³⁴ 409 N.W.2d 911, 914 (Minn. Ct. App. 1987).

³⁵ *Id.* at 914.

³⁶ See invoices attached to Second Affidavit of Samuel D. Orbovich (Dec. 28, 2012) (attached to Application and Petition for Attorneys' Fees).

December 27, 2013.³⁷ The corporate entity's defense of the overpayment charges brought by the Department against its clinics bolsters the conclusion that the clinics are part of the corporation and should not be viewed as separate entities.

The Administrative Law Judge therefore concludes that Apple Tree has failed to show that its Minneapolis and Hawley Clinics fall within the MEAJA's definition of "party." As a result, they are not eligible for an award of attorneys' fees and expenses under Minn. Stat. § 15.472. Given this determination, it is not necessary to reach the further issues raised by the parties regarding whether Apple Tree was the "prevailing party" or whether the Department's actions in this matter were substantially justified.

B. L. N.

³⁷ First Aff. of N. Schumacher, ¶ 16 (Dec. 27, 2012).